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In The
Supreme Court of the United States

OCTOBER TERM, 1953

No. 257

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
Petitioners,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HARRY M. HOXSEY,
Petitioners,
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JULY, 1954.

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In The
Supreme Court of the United States

OCTOBER TERM, 1953

No.

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May It Please the Court:

The Petition of Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, respectfully shows to this Honorable Court:

(a) OPINIONS

United States v. *Hoxsey Cancer Clinic et al.* (R. #491, 1140)[1] reported in 94 F. Supp. 464[2].

United States v. *Hoxsey Cancer Clinic et al.* (R. #491, 1157), reported in 198 F. 2d 273.[3] (Certiorari denied 344 U. S. 928, 97 L. ed. 714, 73 S. Ct. 496, rehearing denied, 345 U. S. 914, 97 L. ed. 1348, 73 S. Ct. 642).

In re: United States, Praying for a Writ of Mandamus, (Appendix I), reported in 207 F. 2d 567.[4]

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[1]The complete record in this case consists of the record filed in this Court in Case No. 491, October Term, 1952, which will be referred to herein as "(R. #491, —)"; the record filed in this Court in Case No. 373, October Term, 1953, which will be referred to herein as "(R. #373, —)"; and the record filed with this petition, which will be referred to herein as "(R. —)".

[2]This was the original opinion in the case in the United States District Court for the Northern District of Texas, by William H. Atwell, United States District Judge, denying an injunction.

Hoxsey Cancer Clinic et al. v. *United States* (R. 20), is reported in 212 F. 2d 439[5].

(b) JURISDICTION

Jurisdiction of this Court is invoked to review, by certiorari, the judgment of the Court of Appeals for the Fifth Circuit dismissing an appeal by petitioners, (i) which judgment was entered May 14, 1954 (R. 21) (ii) no petition for rehearing having been filed and no extension of time granted, but this petition being filed within ninety days from the date of said judgment as provided by Title 28, Section 2101(e), U. S. C. A. (63 Stat. 104); (iii) jurisdiction of this Court being invoked under Title 28, Section 1254(1) (62 Stat. 928).

[3]The United States appealed from the original judgment, which denied an injunction (R. #491, 1149), to the Court of Appeals for the Fifth Circuit, which reversed and ordered an injunction.

[4]Judgment having been entered in the District Court by Judge Atwell on June 29, 1953, for a permanent injunction (R. #373, 28), the United States, without appealing therefrom, filed a Petition for Writ of Mandamus in the Court of Appeals (R. #373, 3) on August 10, 1953, to compel Judge Atwell to amend his judgment by striking certain portions thereof. Petitioners here, who were not parties, asked leave to intervene R. #373, 36). Leave to intervene was denied (R. #373, 38). Petitioners then petitioned this Court for certiorari before judgment, but while that petition was pending the Court of Appeals rendered its opinion, 207 F. 2d 567, holding that Judge Atwell should change his decree as prayed, but without actually ordering a writ of mandamus. Judge Atwell immediately, on October 26, 1953, without notice to petitioners, entered a new judgment (R. 1). Thereafter this Court denied the petition for certiorari which had been pending, 346 U. S. 897, 98 L. ed. 150, 74 S. Ct. 220.

[5]Petitioners appealed from the new judgment entered October 26, 1953, and this petition for certiorari now seeks to have this Court review the judgment dismissing this new appeal.

(c) QUESTIONS PRESENTED

The appeal was dismissed upon the ground that it raised no substantial question for review (R. 16, 20) which is the primary question for review here.

Embraced within that question are the following:

1. That the District Court had no jurisdiction, after term, to amend, alter, or modify its former judgment.

2. That the Court of Appeals had no jurisdiction, in a mandamus action to which petitioners were not parties, to compel the District Judge to amend or alter its former judgment.

3. That the decree is void under the Tenth Amendment insofar as it attempts to prevent duly licensed physicians employed by appellants from prescribing medicines of their own choice.

4. That the decree so construes the Federal Food, Drug and Cosmetic Act as to make said Act violative of the Fifth and Tenth Amendments.

5. That the decree is violative of the Fifth and Sixth Amendments by depriving duly licensed physicians employed by petitioners from dispensing medicines to their own patients, although their claims of curative value are properly qualified.

(d) CONSTITUTIONAL PROVISIONS AND STATUTES

28 U. S. C. A. Sec. 139 (62 Stat. 897) (*infra*, p. 9).

Rule 59(e) Fed. Rules Civ. Proc. (Appendix x).

Rule 6(c) Fed. Rules Civ. Proc. (Appendix x).

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21 U. S. C. A. Sec. 332(a) (52 Stat. 1043) (Appendix xiv).

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21 U. S. C. A. Sec. 353(b) (2) (52 Stat. 1051) (Appendix xiv).

Constitution, State of Texas, Art. 16, Sec. 31 (Appendix xv).

Texas Civil Stat., Art. 4504. Sec. 5742 (Appendix xv).

Texas Civil Stat., Art. 4542a, Sec. 8 (Appendix xv).

(e) STATEMENT OF CASE

The United States brought this action in the United States District Court for the Northern District of Texas seeking a statutory injunction under the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 301; 52 Stat. 1040 *et seq.*), alleging misbranding of certain drugs claimed to be represented by labeling as effective in the treatment of internal cancer in man (R. #491, 3). Trial before William H. Atwell, District Judge, resulted in judgment for the defendants and ordering the cause dismissed (R. #491, 1149, 94 F. Supp. 464).

The United States appealed to the Court of Appeals for the Fifth Circuit, which reversed and remanded, with directions that the trial court "order an injunction to issue as prayed." 198 F. 2d 273 (cert. den., 344 U. S. 928), 97 L. ed. 714, 73 S. Ct. 496; rehear. den. 345 U. S. 914, 97 L. ed. 1348, 73 S. Ct. 642) (R. #491, 1173).

After the case was remanded, the trial court, on June 29, 1953, entered an injunction (R. #373, 28), by which petitioners herein were enjoined from introducing the described drugs into interstate commerce "so long as they are misbranded within the meaning of 21 U.S.C.A. 352(a)", and which misbranding was defined to be the

use of two described booklets as labeling; "also, the labeling thereof which represents, suggests or implies that the drugs are beneficial, effective or have value in the cure, mitigation, or treatment of any type of cancer in human beings,

> "without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations."

The United States did not appeal from that judgment, nor did it file a motion for new trial; neither did it file any motion to "alter or amend" the judgment as provided by Rule 59(e) (Appendix x) of the Federal Rules of Civil Procedure.

Instead, on August 10, 1953, the United States filed an independent action in the Court of Appeals for the Fifth Circuit (R. #373, 3), in which petitioners were not made parties and were not given notice, praying for a writ of mandamus to compel the trial judge (William H. Atwell), to strike from the decree of injunction the qualifying phrase above indented. Without waiting for the issuance of any order to show cause, Judge Atwell immediately filed a response (207 F. 2d, at 569). Petitioners thereafter filed an application for leave to intervene (R. #373, 36), which was denied (R. #373, 38). Petitioners then petitioned this Court for certiorari before judgment (R. #373), but before that petition was passed on by this Court (346 U. S. 897, 98 L. ed. 150, 74 S.

Ct. 220), the Court of Appeals handed down its opinion (207 F. 2d 567, Appendix i).

Thereafter, on October 26, 1953, without notice to petitioners, and at a different term of court from that in which the former judgment was entered, the District Court (Atwell, J.), entered a new judgment (R. 1), in which the above quoted qualifying phrase was stricken from the previous judgment.

From this latter judgment petitioners appealed to the Court of Appeals for the Fifth Circuit (R. 3), and on May 14, 1954, that court dismissed the appeal (R. 21).

No question is here presented as to the correctness of the original judgment of the Court of Appeals; but only as to the correctness of the form of the last judgment (R. 1) and as to the power of the district court to enter it, as distinguished from the first judgment entered in compliance with the mandate (R. #373, 28).

The only pertinent facts in addition to the record facts as above set forth which are necessary to a full consideration of the questions presented, are:

That every person receiving the medicines involved are first "personally examined" (R. #491, p. 910) by a *physician* duly licensed as such by the State of Texas and a graduate of a medical school (*id.* pp. 902-3); that no medicine is *sold*, and the only medicines going into interstate commerce are those given or sent to these patients,

under prescriptions by the doctor who examines them (*id.*, pp. 910, 915-6). (See, excerpts from record, Appendix viii).

(h) ARGUMENT

(1) The judgment appealed from is void for want of jurisdiction of the district court to enter it.

The judgment appealed from was entered October 26, 1953 (R. 1),

> "at a *special term* of the United States District Court in and for the Northern District of Texas, *begun and holden* at Dallas, Texas, on the 7th day of September, A. D. 1953, and which said term is still in session."

The judgment entered by the district court "pursuant to the mandate" was *at a prior term* of that court, on June 29, 1953 (R. #373, p. 28).

This is necessarily true because it is provided by Title 28, Sec. 139, U. S. C. A., that,

> "A term of a district court continues for all purposes until terminated by order of final adjournment or by *commencement of the next general or special* term at the same place."

United States v. *Perlstein* (D.C., N.J.), 39 F. Supp. 965 (aff., 126 F. 2d 789; cert. den. 316 U. S. 678, 62 S. Ct. 1106, 86 L. ed. 1752).

The question then arises: Did the district court have the *power* to alter or amend its judgment entered at a prior term by striking part of the prior judgment?

In *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. ed. 797, it is held:

> "It is — well established that *after the term has ended*, all final judgments and decrees of the court *pass beyond its control* unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist they can only be corrected by such proceeding, *by writ of error or appeal*, as may be allowed in a court which by law can review the decision."

This has always been the law, and has not been changed in this respect by the new Federal Rules of Civil Procedure. This is made clear in *National Popsicle Corp.* v. *Hughes* (D.C., Cal.), 32 F. Supp. 397, holding that subdivision (c) of Rule 6 (Appendix x),

> " * * * cannot be construed as meaning that a court has continuing jurisdiction over its final judgments, and, *if* period of termination is specified in rules of civil procedure, *such period governs*, but otherwise *the end of the term marks the termination of court's power* to modify or vacate final judgments."

See, also, *Reed* v. *South Atlantic S. S. Co. of Del.*, 2 F. R. D. 475, quoting from Moore's Federal Practice, p. 416, where it is said:

> " 'Although the court, by virtue of Rule 6(c), has the power, in its sound discretion, to revise its judgment irrespective of the expiration of a term of court, *its power is subject to the Federal Rules*, particularly Rules 59 * * * and 60 * * *.' The plaintiff could be relieved of the order * * * in the discretion of the court, *provided* he had made his motion for relief within * * * time."

Thus the United States, if it felt aggrieved by the judgment of June 29, 1953, might — in the discretion of the court—have been relieved thereof, *provided* it had filed a motion to alter or amend the same "not later than 10 days after" its entry, as provided by Rule 59(e) (Appendix x).

Or, it might have appealed from that judgment, even though the term had expired, *provided* it had done so within 60 days, as provided in Rule 73 (Appendix xi).

But the United States took neither of these steps.

The power of the court was subject to those rules, and even the court could not have enlarged the time provided by those rules, for it is expressly *prohibited* by Rule 6(b) (Appendix x) from extending

> "the time for taking any action under rules * * * 59(b) (d) and (e), * * * and 73(a) and (g), except to the extent and under the conditions stated in them."

Since it is clear that the district court itself had no power to so alter or amend its judgment after term, the question next arises: Did the Court of Appeals have any power to order the district court to do so, by mandamus?

> "Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the *power* to perform the act."
>
> *State of Missouri ex rel.* v. *Murphy,* 170 U. S. 78, 18 S. Ct. 505, 42 L. ed. 955.

To the same effect, see:

United States ex rel. Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. ed. 183;
Brownsville v. *Loague,* 129 U. S. 493, 9 S. Ct. 327, 32 L. ed. 780;
Ex parte Rowland, 104 U. S. 604, 26 L. ed. 861;
United States ex rel. v. *The County Court,* 95 U. S. 769, 28 L. ed. 545;
Denver-Greeley Vall. Irr. Dist. v. *McNeil* (C.C.A. 10), 106 F. 2d 288;
McNeurtery v. *Clark* (C.C.A., D.C.), 157 F. 2d 703.

In *Re: National Park Bank,* 256 U. S. 131, 41 S. Ct. 403, 65 L. ed. 863, this Court was asked *by mandamus* to compel the Court of Appeals to *correct* its decree, *after term,* and it was said:

> "It is clear that the rule granted must be discharged. The decree entered by the circuit court of appeals was, in the light of its opinion, a *final* one, and disposed of all the issues before it. That court was *powerless* to modify the decree after the expiration of the term at which it was entered. *If* the omission in the decree had been adequately called to the court's attention *during* the term, it would doubtless have corrected the error complained of; or relief *might* have been sought in this court by a petition for a writ of certiorari. The bank *failed to avail itself of remedies open to it.* A petition for writ of mandamus will not be granted under such circumstances. (*Re: Riddle,* 255 U. S. 450, 41 S. Ct. 370, 65 L. ed. 725)."

The motion of the United States to dismiss this appeal (R. 16) was on the ground that the appeal was "frivolous and raises no substantial question for review,"

and the opinion of the Court of Appeals in dismissing was stated to be on the authority of *Amalgamated Association* v. *Southern Bus Lines,* 201 F. 2d 53 (R. 20).

The cited case was a second appeal from judgments entered following a previous reversal "with *specific directions* to dismiss for want of jurisdiction," and the second appeal was dismissed because,

> "This time the appeals are from judgments entered * * * in execution of, and *in precise accord* with, our mandates.
>
> "In *such* circumstances, *unlike where judgments of reversal are general,* appeals from the judgments entered on the mandate present nothing for our review. The appeals are, therefore, dismissed,"

citing, 28 U. S. C. A. Sec. 2106, n. 390; *Merrill* v. *Natl. Bank* (C.A. 5), 78 F. 208; *Singer Mfg.* v. *Adams* (C.A. 5), 185 F. 768; *Seagraves* v. *Wallace* (C.A. 5), 69 F. 2d 163.

It is to be noted that both the opinion of the Court of Appeals reversing on the first appeal (R. #491, p. 1173), and the mandate of that court (R. #373, p. 21) state, in *general* terms, that the cause was,

> "reversed, and remanded with direction that the trial court order an injunction to issue as prayed."

The injunction "as prayed" (R. #491, p. 6) was against the introduction into interstate commerce of "the said drugs or any similar article of drug *which is misbranded* within the meaning of Section 502(a) of the Act (21 U. S. C. 352(a)." And in the complaint itself (R. #491,

p. 3) two specifically described booklets were alleged as the labelling which constituted the "misbranding" complained of, and these were specifically prohibited by the judgment entered under the mandate on June 29, 1953 (R. #373, 29).

The judgment entered by the district court on June 29, 1953, "pursuant to the mandate" of the Court of Appeals was, therefore, whether right or wrong, a *final* one and disposed of all issues before it, and it was *powerless* to modify that decree after the expiration of the term, the United States having failed to avail itself of remedies open to it. And the Court of Appeals was likewise *powerless* to order the District Court to so modify its decree.

Furthermore, since the remand and directions for judgment to be entered was in general terms, and did not direct a *specific* judgment, mandamus was not the proper remedy to be used to perform the office of an appeal.

Ex parte Schwab, 98 U. S. 240, 25 L. ed. 105;

Ex parte Loring, 94 U. S. 418, 24 L. ed. 165;

Ex parte Loring, 94 U. S. 350, 24 L. ed. 194.

The District Court, in entering the judgment on June 29, 1953, in the form in which it was entered, was acting *judicially* and not merely in the performance of a *ministerial duty*, and its judgment as to the form of the

judgment could not be reviewed by mandamus in any event.

Mississippi v. *Johnson*, 71 U. S. (4 Wall.) 498, 18 L. ed. 437;

Gaines v. *Thompson*, 74 U. S. (7 Wall.) 347, 19 L. ed. 62;

Ex parte Morgan, 114 U. S. 174, 29 L. ed. 135.

In the last cited case it was held that,

"The judgment of an inferior court upon a motion to amend its original judgment in a cause cannot be reviewed by mandamus."

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(2) The Opinion of the Court of Appeals in the Mandamus Action Was Without Jurisdiction and Violates the Fifth Amendment.

The petition for a writ of mandamus (R. #373, p. 3), prayed (*id.*, p. 7), that Judge Atwell be commanded to expunge from the "final decree" of June 29, 1953, the qualifying phrase contained therein,

"without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations."

And the Court of Appeals in its opinion in the case (207 F. 2d at 570, Appendix p. vi) says that this language "had the effect of emasculating, if not completely nullifying, the mandate."

Taking this statement as true, it is plain that these petitioners necessarily had a *vital interest* in the mandamus action.

While the Federal Rules of Civil Procedure and the Rules of this Court do not apply, as such, in the Courts of Appeal, still the Courts of Appeal are governed by the principles which underlie such rules. And it is noted that Rule 19(a), (b) and (c) (Appendix xii), of the Federal Rules of Civil Procedure provides that "persons having a joint interest *shall* be made parties and be joined" and that a judgment "does not affect the rights or liabilities of absent persons;" and that reason shall be stated for parties being omitted; and that Rule 24(a) provides for intervention as of right when applicant's interest by existing parties is or may be inadequate and where he may be bound by the judgment.

It is likewise noted that in mandamus actions in this Court, the Revised Rules of this Court (effective July 1, 1954) provide, in Rule 31(3) (Appendix xiii), that the petition shall be served on every party in respect of which relief is desired.

Yet, though petitioners asked for leave to intervene (R. #373, p. 36), they were not made parties and leave to intervene was denied (R. #373, p. 38).

This was in disregard of all established principles governing necessary parties to mandamus actions, in which it is held to be elementary that all parties interested adversely to relator *must* be made parties.

Root Refining Co. v. *Universal Oil Products Co.* (C.A. Del. & Pa.) 169 F. 2d 514 (cert. den. 69 S. Ct. 481, 335 U. S. 912, 93 L. ed. 444);

Morton's Estate v. *Chapman*, 124 Tex. 42, 75 S. W. 2d 876;

California Cotton Credit Corp. v. *Superior Court of Calif.*, 122 Cal. App. 404, 10 P. 2d 176;

Borough of Fort Lee, N. J. v. *U. S.* (C.A. 3), 104 F. 2d 275;

55 C. J. S. 473, Sec. 253;

id., 477, Sec. 254c;

Rule 24(a) Federal Rules of Civil Procedure;

Rule 31(3) Rev. Rules of Supreme Court;

People ex rel. Markee v. *Barrett*, 383 Ill. 207, 48 N. E. 2d 928;

People ex rel. Foley v. *Begole*, 98 Colo. 354, 56 P. 2d 931;

and many other cases.

And the failure to make or to permit the making of petitioners as parties, in order that they might properly and fully protect their rights, is likewise violative of the due process clause of the Fifth Amendment. It is indispensable to "due process" that one must have notice and an opportunity to be heard before judicial power be exercised against him.

Cooley, Constitutional Limitations, p. 434, 6th ed.;

In re: Central R. Co. of N. J. (C.C.A., N.J) 136 F. 2d 633;

Windsor v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914;

Wise v. *Herzog*, 114 F. 2d 486, 72 App. D. C. 335;

Thomas v. *Dist. of Columbia*, 90 F. 2d 424, 67 App. D. C. 179.

This is made plain by the opinion of the Court of Appeals itself wherein, after quoting the answer filed by Judge Atwell (207 F. 2d at 569), it is said (at p. 570):

> "We are of the clear opinion * * * that the answer of the district judge to show cause order not only *presents no reason* why the mandate should not issue as prayed, but, on the contrary, shows that it should * * *,"

and wherein it is further stated that the qualifying phrase is "conceded" by the respondent to "not correspond to the mandate" and that the answer merely attempts to challenge the correctness of the mandate. This makes it quite plain that petitioners' interests were inadequately represented, even though the United States contends they are bound by the judgment.

It has been further contended by the Government (in the Court of Appeals) that petitioners' rights were protected because counsel were permitted to file brief *amicus curiae*, and that, in any event the propriety of the denial of intervention was directly presented to this Court in Case No. 373, October Term, 1953, and certiorari denied (346 U. S. 897).

Yet leave to appear as *amicus curiae* differs from intervention;

Pueblo de Taos v. *Archuleat* (C.A., N.M.), 64 F. 2d 807;

The Claveresk, 264 F. 276;

City of Grand Rapids v. *Consumers' Power Co.*, 185 N. W. 852, 216 Mich. 409;

and the activities of an *amicus curiae* cannot be treated as an appearance by a party;

Spinnler v. *Armstrong* (Tex. Civ. App.), 63 S. W. 2d 1071;

State v. *City of Albuquerque*, 31 N. M. 576, 249 P. 242;

Little v. *Thompson*, 24 Ind. 456,

an *amicus curiae* has no right to question the constitutionality of an act;

State v. *City of Albuquerque, supra,*

and the court will not pass on grounds of invalidity urged by an *amicus curiae* but not presented by the parties,

State v. *Martin*, 210 Iowa 207, 230 N. W. 540.

And it is generally recognized that the refusal of this Court to grant certiorari creates no inferences regarding the correctness of the lower court's decision.

Glick v. *U. S.* (C.C.A., Ill.), 93 F. 2d 953;

Guaranty Trust Co. of N. Y. v. *Henwood* (C.C.A., Mo.), 98 F. 2d 160;

Treinies v. *Sunshine Min. Co.* (D.C., Ida.), 19 F. Supp. 587 (aff. 99 F. 2d 651).

This should apply particularly here when it is noted that the denial of certiorari was *after* the Court of Appeals had already decided the case, stay having been denied pending certiorari — the Court of Appeals having decided the case on October 22, 1953 (207 F. 2d 567), and the petition for certiorari "*before* judgment" not being denied until November 30, 1953 (346 U. S. 897).

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(3) The decree of October 26, 1953, is void Under the Tenth Amendment insofar as it attempts to prevent duly licensed physicians employed by petitioners from prescribing medicines of their own choice.

The decree entered on October 26, 1953 (R. 1) is for an injunction, not only against petitioners here, but also against "their agents, servants, employees, representatives, attorneys and all persons in active concert or participation with them." The same is true of the prior decree entered on June 29, 1953 (R. #373, p. 28).

In the original trial it was shown, and nowhere disputed, that no medicines are *sold* by petitioners (R. #491, p. 910, Appendix viii); that the petitioners *employed* a medical director, who was a duly licensed physician, licensed as such by the State of Texas, and other states (*id.*, p. 902-3, Appendix viii), and who *personally examined every patient* of the clinic (*id.*, p. 910, Appen-

dix viii); that no patient received any of these medicines until he had examined and *prescribed for him* (*id.*, p. 910, 915-6, Appendix ix); and that no medicine going into another state went to anyone besides such a patient (*id.*, p. 910, Appendix ix).

In *Chase Natl. Bank* v. *Norwalk*, 291 U. S. 431, 78 L. ed. 894, 54 S. Ct. 475, it was held that:

> "It is true that persons not technically agents or employees may be specifically enjoined from knowingly aided a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are *legally identified with the defendant and privy to his contempt*, the provision merely makes explicit as to them that which the law already implies. See *Re: Lennon*, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110."

In the cited *Lennon case* an injunction was issued against a railroad company and its "officers, agents, etc., and an engineer employed by the company and who had received notice of the injunction," had refused to obey it, and upon being found guilty of contempt contended the judgment was void for want of jurisdiction. This Court held he could not do this by evidence dehors the records, but was bound by the judgment.

If physicians employed by petitioners are bound by this judgment, petitioners have the right here to raise for their benefit the question of its constitutionality as applied to them, since the court says *they* cannot raise it themselves in another action.

The Tenth Amendment provides that,

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Constitution does not delegate to the United States the power to *regulate the practice of medicine*, nor does it prohibit such powers to the States; that power, therefore, is reserved to the States, or to the people.

It was so held by this Court in *Linder* v. *U. S.*, 268 U. S. 5, 45 S. Ct. 446, 69 L. ed. 819:

> "Obviously, direct control of medical practice in the State is beyond the power of the Federal Government."

And it was held in that case that the Harrison Narcotic Act must be so *construed as not to embrace incidental regulation of medical practice* and that "Congress never intended to interfere" with the *limits of professional conduct* of a doctor.

It was doubtless with this in mind that the Court of Appeals said in its original opinion in this case (198 F. 2d 273, R. #491, pp. 1172, 3):

> "We do not attempt to set ourselves up as arbiters of what method of treatment the Hoxsey Clinic shall employ. *We are not authorized by law to do so.*"

And yet now they *do* attempt to do so, by saying that no substantial question is involved in the appeal, though they have by their opinion in the mandamus case so directed the lower court to regulate the practice of

medicine in Texas that a physician employed by petitioners cannot prescribe the medicines here involved for his own patients even though he qualify his claims of curative value by restricting such claims to his own opinion as contradistinguished from the belief of the majority of other physicians.

It was only on the theory that the taxes levied under the authority of Art. 1, Sec. 8, cl. 1 of the Constitution could fairly be said to be revenue measures, and the acts imposing it not avowedly or palpably intended to accomplish some ulterior purpose under the guise of the exercise of the taxing power, although incidentally they had some regulatory, suppressive, or restrictive effect, that the various narcotic acts (*U. S.* v. *Doremus*, 249 U. S. 86, 36 S. Ct. 658, 63 L. ed. 493; *Alston* v. *U. S.*, 274 U. S. 289, 47 S. Ct. 634, 71 L. ed 1052; and *Linder* v *U. S.*, *supra*); the tax on oleomargarine (*McCray* v. *U. S.*, 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78); the Social Security Act (*Charles Steward Mach. Co.* v. *Davis*, 301 U. S. 549, 57 S. Ct. 883, 81 L. ed. 1279); the National Firearms Act (*U. S.* v. *Miller*, 307 U. S. 174, 59 S. Ct. 816, 83 L. ed. 1206), and other like acts, were sustained.

On the other hand, the Child Labor Tax Law (*Bailey* v. *Drexel Furn. Co.*, 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817); the Agricultural Adjustment Act (*U. S.* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312, 80 L. ed.

477), and the Bituminous Coal Conservation Act (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. ed 1160), were each held *unconstitutional* under the Tenth Amendment as invading State jurisdiction.

The earlier Federal Child Labor Law was likewise held to be unconstitutional under the Tenth Amendment (*Hammer* v. *Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101), as exerting a power as to a purely local matter to which Federal authority does not extend, and also as transcending the authority delegated to Congress over commerce.

This Court in *American Medical Asso.* v. *U. S.*, 317 U. S. 519, 63 S. Ct. 326, 87 L. ed. 434, expressly declined to pass on the proposition "whether a physician's practice of his profession constitutes trade under Sec. 3 of the Sherman Act"; but later, in a similar case, in *U. S.* v. *Oregon St. Medical Soc.*, 343 U. S. 326, 72 S. Ct. 690, 96 L. ed. 978, it did approve a finding by the trial court that,

> "The sale of medical services * * * is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, nor is it commerce within the meaning of the constitutional grant of power to Congress 'To Regulate Commerce * * * among the several states'." 95 F. Supp. at 118,

and pointed out that *American Med. Asso.* v. *U. S.*, *supra*, is not authority to the contrary.

Bearing these principles in mind, we find that the State of Texas, in Art. 16, Sec. 31, of its Constitution

(Appendix xv), and in Chap. 6 of Texas Civil Statutes (Appendix xv) regulating the practice of medicine, provided that "no preference shall ever be given to any school of medicine" or "system of medical practice."

Then, in Chapter 8, Texas Civil Statutes, regulating the sale of drugs, it was provided, in Art. 4542a(8) thereof (Appendix xv) that nothing in the Act should,

> "Apply to or interfere with any licensed practitioner of medicine * * * who is duly licensed as such * * * who shall supply his or her patients, as a physician * * * and by them employed as such, *with such remedies as he or she may desire* * * *."

To the extent, therefore, that the decree appealed from purports and attempts to prevent those regularly licensed physicians employed by petitioners at their clinic from prescribing for their patients the drugs in question —which the decree of October 26, 1953, does do by eliminating the qualifying phrase — then to that extent the decree amounts to an unlawful assumption of power not delegated to Congress, and therefore an unlawful assumption of power by the Court itself.

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(4) The Court of Appeals has So Construed the Federal Food, Drug, and Cosmetic Act as to make it Unconstitutional under the Fifth and Tenth Amendments.

In the *Linder case, supra,* it was suggested that a "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

While there is no absolute, unqualified, or natural right for any person to practice medicine, the right being somewhat in the nature of a privilege granted by the state under its police power under state statutes regulating such practice, *still such* right or privilege, once granted, becomes and is a valuable property right;

Suckow v. *Bd. of Med. Exam. of Cal.*, 182 Cal. 247, 187 P. 965;
Bender v. *Bd. of Regents of Univ. of St. of N. Y.*, 262 App. Div. 627, 30 N. Y. S. 2d 779;
Davis v. *Beeler*, 185 Tenn. 638, 207 S. W. 2d 343;
Kalman v. *Walsh*, 335 Ill. 341, 189 N. E. 315;
Baker v. *Dept. of Reg.*, 78 Utah. 424, 3 P. 2d 1082;
W. Va. St. Med. Assn. v. *Public Health Council*, 125 W. Va. 152, 23 S. E. 2d 609.

Therefore the Court of Appeals, by so construing the Federal Food, Drug and Cosmetic Act as to direct the lower court to deprive the duly licensed physicians employed by petitioners at their clinic of their privilege granted by the State to prescribe for their own patients drugs of their own choice, is to make such Act itself not only an unauthorized assumption of power reserved to the States under the Tenth Amendment, but also so construes the same as to make the Act deprive such physicians of a valuable property right without due process of law in violation of the Fifth Amendment.

This construction of the Act could have been avoided by leaving the qualifying phrase in the decree.

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(5) The decree, by eliminating the qualifying phrase, becomes violative of the Fifth and Sixth Amendments.

The Federal Food, Drug and Cosmetic Act, in 21 U. S. C. A. 331(a) (52 Stat. 1042, Appendix xiv), prohibits,

> "The introduction * * * into interstate commerce of any * * * drug * * * *that is* * * * *misbranded.*"

It does not purport to prohibit commerce in *all* drugs, or in *any particular drug*. The Court, then, would have no power under the Act to enjoin the introduction into interstate commerce of any drug *unless* it is misbranded, and then *only so long* as it is misbranded.

Grave questions arose under the first Federal Food and Drug Act (June 30, 1906, 34 Stat. 768) and the amendment of August 23, 1912 (37 Stat. 416) concerning Congressional power to enter the domain of speculation and uncertainty and thus make the statute operate as a deprivation of liberty and property without due process of law, in violation of the Fifth Amendment and as not permitting the laying of a definite charge as required by the Sixth Amendment.

This Court, in *American School of McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90, said that,

> "The claim of the ability to cure may be vastly greater than *most men* would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only *differ in opinion* from those who assert it."

An attack on the grounds of speculation and uncertainty was met by this Court, in *Seven Cases* v. *U. S.*, 239 U. S. 510, 36 S. Ct. 190, 60 L. ed. 411, by pointing out that in the Act of 1912,

> "Congress *deliberately excluded* the field where there are honest differences of opinion between schools and *practitioners*. Cong. Rec. 62d Cong. 2d Sess. vol. 48, part 12, Appx. p. 675."

Both of these cases were reviewed in *Reilly* v. *Pinkus*, 338 U. S. 269, 70 S. Ct. 110, 94 L. ed. 63, in which this Court said that it accepted the *McAnnulty* decision

> "as a wholesome limitation upon finding of fraud when the charges concern *medical practices* in fields where knowledge has not yet been crystalized in the crucible of experience. For in the science of medicine, as in other sciences, experimentation is the spur of progress."

There the conflict of opinion involved was between physicians as to the efficacy of a *nationally advertised drug sold to the public* by respondent; *not between one physician prescribing medicine of his own choice*, as compared to most other physicians who do not prescribe the same method of treatment for *their* patients and who may disagree with the efficacy of the medicine.

Likewise, in writing the present Act of June 25, 1938, Congress again *deliberately excluded* this realm of speculation and uncertainty, by providing in Sec. 201 (n) of the Act (21 U. S. C. A. Sec. 321 [n], 52 Stat. 1041, Appendix xiii) that in determining whether a labeling be misleading,

> "there shall be taken into account (among other things) not only representations made * * * but also the extent to which the labeling fails to *reveal facts material in the light of such representations* * * *."

That Congress by this provision intended to prohibit the introduction of a drug into interstate commerce with a label claiming curative value, *only if*, and *only so long as* such label did not fairly reveal the conflicting opinions as to the truth of representations, is plainly shown in Report No. 2139 of the House of Representatives (Cong. Rec. 75th Cong., as reported by Toulmin Law of Food, Drugs and Cosmetics, p. 400:

> "One of the important applications of section 201 (n) relates to this problem. If only a *few* experts regard a label statement of curative value as true but the *great body* of qualified experts in that particular field regard the statement as untrue, then there may be substantial ground for concluding that the curative claim is misleading *unless it is qualified in such a way as to show the conflicting opinion as to its truth.* * * * However, the misleading character of the label may be *corrected by an appropriate qualifying statement revealing this material fact.*"

Thus if a duly licensed physician employed by the Hoxsey Clinic says to his patient: "I believe in this medi-

cine, but no other doctor in the world believes in it," he has qualified his claim of curative value in such a way that the patient can decide for himself whether he wants to take this particular treatment, and the patient will not be "mislead."

This is the very thing which Judge Atwell permitted to be done by his original decree, and he had this very provision of the statute and this very comment of Congress in passing the statute, in mind, when he expressed the opinion (R. #393, p. 32) that he believed the form of decree submitted by the Government, without this qualifying phrase in it, to be "a little too broad."

The Court, in *Hygrade Food Products Corp.* v. *U. S.* (C.C.A., Iowa), 160 F. 2d 816, found a similar injunction which had been made "too broad," and said:

> "* * * The injunction should forbid *only the acts which are prohibited by the statute.*"

And in *N. Y., N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361, 26 S. Ct. 272, 50 L. ed. 515, this Court held that an adjudication of violation in a specific particular,

> "In no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a *general* character as would be violative of the most elementary principles of justice."

We have submitted to the finding of the Court of Appeals in its first opinion (R. #491, 1157, 198 F. 2d 273) that the use of the booklets formerly used as label-

ing constituted misbranding and to the terms of the decree enjoining us from further use of those booklets, as well as to the terms of the decree which enjoin the introduction of these specific drugs into interstate commerce *so long as they are misbranded.*

But this does not give countenance to the assumption that Congress intended that the Court should issue, or order the issuance of, an injunction of such a general character as to absolutely forbid the dispensing of these drugs by a physician under a properly qualified label.

As further evidence that Congress deliberately intended to exclude the field of medical practice from the prohibitions of the Act, it is seen that 21 U. S. C. A. Sec. 352(b) (2) (52 Stat. 1051) (Appendix xiv) provides certain exemptions in the dispensation of drugs "by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug;" but without specifically providing such exemptions for the practitioner himself. The only logical conclusion is that Congress recognized that by reason of the Tenth Amendment it had no right to interfere with the dispensation of any drug by any doctor so long as done in the course of his practice and to his own patients.

The Court of Appeals is not consistent when it says in its original opinion, *supra*, that,

> "We do not attempt to set ourselves up as arbiters of what method of treatment the Hoxsey Clinic shall employ. *We are not authorized by law to do so,*"

and then, by its opinion in the mandamus action (Appendix i, 207 F. 2d 567), does that very thing — sets itself up as arbiter of the method of treatment—by saying to Judge Atwell that he must absolutely enjoin the giving of this medicine by the physicians at the clinic of petitioners as a prescription under any circumstances. And yet when that very question is raised by the appeal, it says that no substantial question is presented, although it has never ruled that it is authorized by law to say what method of treatment shall be used and what shall not be used.

Some apt statements are made in *State* v. *Biggs*, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139:

> " * * * Some M.D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M.D.'s themselves * * * or is the public the tribunal to decide, by employing whom each man prefers * * * ? *The law cannot decide* that any one system shall be the system he shall use * * *. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief, * * * not by the M.D.'s themselves, *nor by the courts* * * *. When the Master, who was Himself called the Good Physician, was told that other than His followers were casting out devils and curing diseases, He said, 'Forbid them not'."

CONCLUSION AND PRAYER FOR RELIEF

IN CONCLUSION, it is respectfully submitted that there *were* substantial questions of law presented by the

appeal to the Court of Appeals, regarding the jurisdiction both of the District Court and of the Court of Appeals to alter or amend a judgment after term, as to the validity of the amended and altered decree under the Fifth, Sixth, and Tenth Amendments, and as to the constitutionality of the Federal Food, Drug and Cosmetic Act as construed by the Court of Appeals; which questions the Court of Appeals has failed and refused to decide, by dismissing the appeal; and that thereby the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court, or have decided the same in a way in conflict with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioners respectfully pray that this Honorable Court exercise its discretion and under its supervisory powers assume jurisdiction of this case by the granting of a writ of certiorari directed to said Court of Appeals for the Fifth Circuit commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record in said cause entitled on its docket, "Hoxsey Cancer Clinic, a Partnership, and Harry M. Hoxsey, an Individual, Appellants, versus United States of America, Appellee, No. 14870;" and that said judgment of the said Court of

Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

HOXSEY CANCER CLINIC, and
HARRY M. HOXSEY,
Petitioners,
By JAMES H. MARTIN,
Dallas National Bank Bldg.,
Dallas, Texas,
Attorney for Petitioners.

LEE WILLIAMS,
1015 Cravens Building,
Oklahoma City, Oklahoma,
Of counsel.

JULY, 1954.

The undersigned attorney for petitioners hereby certifies that he believes there is merit in the foregoing Petition and that the same is filed in good faith and not for delay.

JAMES H. MARTIN,
Attorney for Petitioners.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14690

IN RE: UNITED STATES OF AMERICA, PRAYING FOR A WRIT OF MANDAMUS

(207 F. 2d 567)

Petition for a Writ of Mandamus to the United States District Court for the Northern District of Texas

(October 22, 1953)

Before HUTCHESON, Chief Judge, and RUSSELL and RIVES, Circuit Judges

PER CURIAM: Alleging that, though directed by the mandate of this court[1] to "order an injunction to is-

sue as prayed," the district judge had failed and refused to do so, the United States of America files its petition,[2]

[1]In accordance with its opinion, 198 F 2d 273.

[2]As the petition briefly and correctly alleges them, these are the substantial facts on which the claim of the United States to relief is based:

"1. On Novmber 15, 1950, the United States instituted an action in the United States District Court for the Northern District of Texas by filing a complaint wherein a statutory injunction, under the Federal Food, Drug and Cosmetics Act, was sought to restrain the Hoxsey Cancer Clinic, a partnership, and Harry M. Hoxsey, an individual, from introducing into interstate commerce certain liquid medicines represented by labeling as effective in the treatment of internal cancer in man. Defendants answered. The case came on for trial before the Court and resulted in a judgment for the defendants. The trial court's opinion dismissing the cause is reported at 94 Fed. Supp. 464.

"2. The United States duly perfected its appeal to this Court, and the cause was there argued and submitted. On July 31, 1952, this court decided the cause, reversed the said judgment and remanded the case with direction that the trial court order an injunction as prayed. This court's opinion is published at 198 F. 2d 273.

"3. The said Hoxsey Cancer Clinic and Harry M. Hoxsey filed a petition for a writ of certiorari in the Supreme Court of the United States, and on Feb. 2, 1953, the Supreme Court denied the petition, 344 U. S. 928. A motion for rehearing on the said petition was denied on Mar. 9, 1953, 345 U. S. 914.

"4. On Feb. 7, 1953, this Court's mandate was issued, directed to the said United States District Court for the Northern District of Texas. A copy of the mandate is attached hereto as Exhibit 'A'.

"5. The United States thereupon prepared and submitted to the Honorable William H. Atwell, Judge of the United States District Court for the Northern District of Texas, a proposed decree and requested that it be entered in conformance with the said mandate.

"6. The Honorable William H. Atwell directed counsel for the United States to submit the proposed decree to opposing counsel for approval. After diligent efforts to obtain such approval failed, counsel for the United States advised Judge Atwell that James H. Martin, local counsel for the defendants, had disapproved the decree and that said counsel for the United States was unable to obtain approval from the principal counsel for the defendants, Herbert K. Hyde of Oklahoma City. Counsel for the United States thereupon renewed his request that the proposed decree be entered. A copy of the proposed decree is attached as Exhibit 'B'.

"7. On June 12, 1953, Judge Atwell, by letter to counsel, advised William Cantrell, Jr., Assistant United States Attorney, that he had examined the Government's proposed decree and that he would sign it on June 29 ,1953, when the case was set for final disposition. A copy of Judge Atwell's letter to counsel is attached as Exhibit 'C'.

"8. Upon receipt of a copy of Judge Atwell's letter, Lee Williams, one of the attorneys for Hoxsey Cancer Clinic and Harry M. Hoxsey, requested and received a copy of the decree proposed by the government, and thereupon submitted an alternative proposal for a decree. This alternative pro-

praying that a writ of mandamus issue to Judge William H. Atwell, Judge of the United States District Court for the Northern District of Texas, "To vacate and expunge the final decree of June 29, 1953, so far as it fails to conform to the mandate of this Court, by striking from the said final decree the words reading as follows: 'without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations'."

---

8 Cont'd.
posal, a copy of which is attached as Exhibit 'D', was approved by the Court and signed as the final judgment on June 29, 1953. A transcript of the proceedings before the said Court incident to such signing is attached as Exhibit 'E'.

(The substantial difference in the two decrees consists of the addition of these words "without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.")

Based upon these facts, the petition proceeds as follows:

"9. Petitioner believes that the final decree is not in accordance with the mandate of this Court insofar as it authorizes the continued interstate distribution of the Hoxsey cancer medicines on condition that claims of effectiveness as cancer cures be qualified by a statement that there is a conflict of medical opinion as to the truth of such claims. This court has ruled that claims that the Hoxsey medicines will cure cancer are false in fact, thus leaving no room for asserted differences of medical opinion.

"10. Petitioner is advised and believes that a Writ of Mandamus is appropriate to control the action of a district court when such lower court has misconstrued the mandate of the Appellate Court and has not complied with the said mandate."

"WHEREFORE petitioner prays that a writ of mandamus may be issued out of and under the seal of this court, directed to the Honorable William H. Atwell, Judge of the United States District Court for the Northern District of Texas, commanding and requiring him as follows:

"To vacate and expunge the final decree of June 29, 1953, so far as it fails to conform to the mandate of this Court, by striking from the said final decree the words reading as follows, 'without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.'

"Petitioner further prays that an order may be issued, directed to the said William H. Atwell, Judge of the United States District Court for the Northern District of Texas, requiring him to show cause in this court, at a time to be designated, why he should not vacate and expunge the judgment entered on June 29, 1953, and enter judgment according to the terms of the said mandate of this court as aforesaid."

A show cause order having issued as prayed in the petition, Judge Atwell filed his answer to the order as follows:

"COMES NOW William H. Atwell, Judge of the United States District Court for the Northern District of Texas, in answer to the order made by this Honorable Court, which order is dated February 7th, 1953, and which order is predated before the complained of injunction was signed by me. Such order was not signed until June 29, 1953.

"Such order in all respects, corresponds to the judgment of this Honorable Court, save and except the paragraph which is now objected to by the government, reading as follows:

" 'Without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.'

"The opinion of this Honorable Court shows distinctly that it recognized that there were different opinions as to the curative value and power of the defendant's remedies.

"In addition to such statement by this Honorable Court in its opinion was the great volume of testimony from witnesses in person who appeared and testified that they had been cured of skin cancer by the defendant's treatment and remedies. Photographs of the afflicted persons, both men and women, were offered in evidence, and identified by the respective witnesses as photographs of themselves when they were so suffering. And as they testified in court, there were no such blemishes, or, skin disorders that could be seen.

"This statement is made with great respect and with the statement that the McAnnulty healing case, 187 United States, when reexamined, as shown 338 United States, does not do away with the power of

the trial court to pass upon the weight and credibility of the testimony.

"In the oral opinion which I rendered at the conclusion of the trial of the case, I held the government had not satisfied the burden of proof resting upon it.

"With great respect, I am

Yours very earnestly,

(S.) W. H. Atwell,
United States District Judge."

Thereafter an application was made to this court by the Hoxsey Cancer Clinic and Harry M. Hoxsey for leave to intervene in the mandamus proceeding. In the alternative, if such leave was denied, its counsel sought leave to file a brief *amicus curiae*. Leave to intervene was denied, leave to file a brief *amicus curiae* was granted, and the brief was filed.

We are of the clear opinion, for the reasons hereafter briefly stated, that the decree of the court to the extent complained of in the petition is in direct conflict with our mandate, that the answer of the district judge to the show cause order not only presents no reason why the mandate should not issue as prayed, but, on the contrary, shows that it should, and that the complained of paragraphs should be stricken and expunged from the decree.

"It is settled that if the lower court misconstrues a decree of an appellate court and does not give full effect to the mandate his action may be controlled by a writ of mandamus. Whatever was before the

appellate court and disposed of by the decree is considered as finally settled and becomes the law of the case. The trial court must carry the decree into execution according to the mandate. In re Potts, Petitioner, 166 U. S. 263." In Re N V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 F. 2d 915.

The district judge, in his letter attached as Exhibit "C" to the petition, in which he stated that he would sign the decree presented by the United States for entry, recognized this to be the law. In that letter he stated, "The order seems to be in accordance with the direction of the Circuit Court of Appeals and I will sign the order on June 29th, when the case is set down for final disposition."

Instead, however, of signing the order as presented, he added to it language which had the effect of emasculating, if not of completely nullifying, the mandate. This is made plain not only by a comparison of mandate and decree but by the respondent's answer. Conceding in it that the complained of addition to the decree, "without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations," does not correspond to the judgment of this court, he attempts to justify its use in his decree by challenging the correctness of the mandate. Stating, "The opinion of this Honorable Court shows distinctly that it recognized that there were different opinions as to the curative value

and power of the defendant's remedies. * * * that the McAnnulty healing case, 187 United States, when re-examined, * * * does not do away with the power of the trial court to pass upon the weight and the credibility of the testimony. * * * In the oral opinion which I rendered at the conclusion of the trial of the case, I held the government had not satisfied the burden of proof resting upon it.", he asserts in effect that he has a right to correct our mandate to conform to these views.

Thus reasserting the correctness of his judgment, which this court has reversed, and the incorrectness of our judgment reversing it, the respondent instead of confessing error in not accepting and giving effect in his decree to the judgment of reversal, defends the reinstatement of his own judgment to the extent accomplished by the addition to the decree. This he may not do.

In accordance, however, with the practice of this court, which proceeds on the assumption that the district judge will conform to this court's directions herein contained, without the necessity of issuing the writ prayed for, *In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, supra,* a copy of this opinion will be certified to the district judge for his guidance, and the writ will not at this time issue.

Excerpts from record in Case No. 491, October Term, 1952:

R. 902

"DR. J. B. DURKEE, being first duly sworn, examined in chief by Mr. Martin, testified as follows:

Q. Is your name Doctor J. B. Durkee?

A. Yes, sir.

Q. Where are you practicing, or where are you employed at this time?

A. At the Hoxsey Cancer Clinic.

Q. Are you the Medical Director of the Hoxsey Cancer Clinic?

A. Yes, sir.

Q. How long have you been acting in that capacity?

A. Approximately five years.

(903)

Q. Are you a duly licensed doctor in the State of Texas?

A. Yes, sir.

(910)

Q. Now, do you examine, personally every patient that appears there?

A. Yes, sir.

Q. Does the patient receive any medicine until you have examined and prescribed for him?

A. No, sir.

Q. Is there any medicine at this clinic offered for sale?

A. No, sir.

Q. Is there any medicine sold at this clinic?

A. No, sir.

Q. Medicines that may be introduced in interstate commerce, that is, going into another state, is that sent to anyone besides a patient?

A. No.

Q. Do you recall if medicines have heretofore been shipped to doctors in other states?

A. It has in the past.

Q. Now, has that practice been discontinued?

A. It has.

(915)

Q. Now then, after you have examined the patient and you are going to prescribe for this patient, do you give them all the same?

A. No, sir, we prescribe for the patient, depending on the indications that their particular case presents.

Q. And what do you take into consideration when you come to prescribe for a patient?

A. We take into consideration everything we can about the patient, the history, what has been done before, the present condition, and other conditions that may be present, regarding the individual patient. Then, any conditions that the patients themselves have found in their past history, we take into consideration their diet, even their environment.

Q. And after considering all of that, then you, personally prescribe?

A. Yes, sir.

Q. And, now, is that prescription filled and compounded by you, personally?

A. Under my personal direction.

Q. Either you, or under your direction. (916)

A. Yes.

Q. At what place?

A. 4507 Gaston, Hoxsey Cancer Clinic.

Q. Do you have a drug department there?

A. Yes, we have a drug dispensary, and we have a storeroom."

Rule 59(e) Fed. Rules Civ. Proc.:

"MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 6(c) Fed. Rules Civ. Proc.:

"UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

Rule 6(b) Fed. Rules Civ. Proc.:

"ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order

or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Rule 73(a) Fed. Rules Civ. Proc.:

"APPEAL TO A COURT OF APPEALS.

"(a) WHEN AND HOW TAKEN. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

Rule 19, Fed. Rules Civ. Proc.:

"(a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. * * * ."

"(b) EFFECT OF FAILURE TO JOIN. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. * * * but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

Rule 24(a) Fed. Rules Civ. Proc.:

"INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or

subject to the control or disposition of the court or an officer thereof."

Rule 31 (3) Revised Rules of Supreme Court (effective July 1, 1954):

"PROCEDURE ON APPLICATIONS FOR EXTRAORDINARY WRITS.

"3. If the petition seeks issuance of * * * a writ of mandamus, * * * the motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court."

Federal Food, Drug, and Cosmetic Act.

21 U. S. C. A. Sec. 321 (n) (52 Stat. 1041):

"If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual."

21 U. S. C. A. Sec. 331(a) (52 Stat. 1042):

"The following acts and the causing thereof are hereby prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

21 U. S. C. A. Sec. 332(a) (52 Stat. 1043):

"The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title except paragraphs (e), (f) and (h)-(j)."

21 U. S. C. A. Sec. 333 (52 Stat. 1043):

"(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor * * *."

21 U. S. C. A. Sec. 352(a) (52 Stat. 1050):

"A drug or device shall be deemed to be misbranded * * *

"(a) If its labeling is false or misleading in any particular."

21 U. S. C. A. Sec. 353(b) (2) (52 Stat. 1051):

"Any drug dispensed by filling or refilling a written or oral *prescription of a practitioner licensed by law to administer such drug* shall be exempt from the requirements of section 352 of this title, except subsections (a), (i) (2) and (3), (k), and (l) of said section, and the packaging requirements of subsections (g) and (h) of said section, if the drug bears a label containing the name and address of the dis-

penser, the serial number and date of the prescription or of its filling, the name of the prescriber, and, if stated in the prescription, the name of the patient, and the directions for use and cautionary statements, if any, contained in such prescription. This exemption shall not apply to any drug dispensed in the course of the conduct of a business or dispensing drugs pursuant to diagnosis by mail, or to a drug dispensed in violation of paragraph (1) of this subsection."

Constitution of Texas, Art. 16, Sec. 31:

"The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but no preference shall ever be given by law to any school of medicine."

Texas Civil Statutes, Chapter Six, "Medicine," Art. 4504, Sec. 5742:

"Nothing in this chapter shall be so construed as to discriminate against any particular school or system of medical practice * * *."

Texas Civil Statutes, Chapter Eight, "Pharmacy," Art. 4542a, Sec. 8:

"It shall be unlawful for any person who is not a registered pharmacist under the provisions of this act to compound, mix, manufacture, combine, prepare, label, sell or distribute at retail or wholesale any drugs or medicines, except in original packages. Provided that all persons registered as pharmacists in this State shall have the rights granted to pharmacists under this Act. Provided, however, that nothing in this Act shall apply to or interfere with any licensed practitioner of medicine, dentistry or chiropody, who is duly licensed as such by their respective State Board of Examiners of this State, who

shall supply his or her patients, as a physician, dentist or chiropodist, and by them duly employed as such, with such remedies as he or she may desire and who does not keep a pharmacy, open shop or drug store, advertising or otherwise, for the retailing of medicines or poisons; and provided, further, that nothing contained in this Act shall be construed to prevent the personal administration of drugs and medicines carried by any physician, surgeon, dentist, chiropodist or veterinarian licensed by his respective board of examiners of this State, in order to supply the immediate needs of his patients; * * *."

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 257

HOXSEY CANCER CLINIC, A PARTNERSHIP, AND HARRY M. HOXSEY, AN INDIVIDUAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This petition for certiorari is in essence a third petition for rehearing before this Court.

The proceeding was instituted by the United States under the Federal Food, Drug, and Cosmetic Act to enjoin the petitioners from introducing the Hoxsey medicines into interstate commerce on the ground that they were falsely represented by labeling to be effective cures for cancer in man. The District Court denied the government's prayer for

relief, 94 F. Supp. 464. On appeal, the judgment was reversed, 198 F. 2d 273 (C. A. 5). The Court of Appeals found that petitioners' literature falsely represented that the medicines had actually cured cancer and further that the evidence established that the medicines could not cure cancer since they consisted of well known drugs which, as a cure for cancer, "have been weighed and found wanting." The court accordingly ordered that the judgment be reversed with directions that an injunction issue as prayed. A petition for a writ of certiorari and a subsequent petition for rehearing were denied by this Court. 344 U. S. 928; 345 U. S. 914 (No. 491, O. T. 1952).

On June 29, 1953, the District Court entered a final judgment in the form proposed by petitioners. It prohibited labeling the drugs to represent, suggest, or imply that the drugs are beneficial, effective, or have value in the cure, mitigation, or treatment of any type of cancer in human beings, "*without appropriate qualifying statements revealing the conflict of medical opinion as to the truth of such representations.*" On August 10, 1953, the United States, believing that the mandate of the Court of Appeals had not been complied with, filed a petition for a writ of mandamus in the Court of Appeals to have stricken from the injunction the qualifying words italicized above. When petitioners sought leave to intervene in the mandamus proceeding, the Court of Appeals denied leave but afforded petitioners an opportunity, of which they took ad-

vantage, to present as *amicus curiae* their views of the applicable law. A petition for a writ of certiorari seeking review of the denial of leave to intervene was denied by this Court. 346 U. S. 897 (No. 373, O. T. 1953).

While the second petition for certiorari was pending, the Court of Appeals rendered its opinion in the mandamus proceeding. 207 F. 2d 567. It found "that the decree of the court to the extent complained of in the petition is in direct conflict with our mandate, that the answer of the district judge to the show cause order not only presents no reason why the mandate should not issue as prayed, but, on the contrary, shows that it should, and that the complained of paragraphs should be stricken and expunged from the decree" (Pet. App. V). In accordance with its practice, the Court of Appeals certified its opinion to the district judge but withheld issuance of the writ of mandamus. On October 26, 1953, the district judge issued a permanent injunction complying with the suggestion of the Court of Appeals and omitting the phrase italicized above.

Petitioners' appeal from that decree was dismissed by the Court of Appeals on May 14, 1954. This petition for certiorari seeks review of the order of dismissal. It is evident, however, that the appeal and the petition for certiorari raise no question of merit.

1. The argument that the District Court was without power, after expiration of the term, to

amend its judgment to conform with the mandate of the Court of Appeals (Pet. 9-15) is frivolous. This court held in *United States* v. *United States District Court*, 334 U. S. 258, that an appellate court had the power "to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court" even though the term at which the mandate had issued had expired and even though no further appellate proceedings before the higher court might be possible. Manifestly, this decision implies that the District Court, when ordered to do so, could properly conform its judgment to the mandate. Even before Rule 6(c) of the Rules of Civil Procedure provided that "The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it", this Court had held that an appellate court could by mandamus compel a lower court to amend its judgment to conform with a mandate. *In re Washington and Georgetown Railroad Company*, 140 U. S. 91. The power to do so after enactment of the Rules is not open to question.

2. Petitioners' argument that the action of the Court of Appeals on the petition for mandamus was void because they were denied the right to intervene (Pet. 15-20) is an attempt to reargue the prior petition for certiorari in No. 373, O. T. 1953. As the government there pointed out, the mandamus proceeding concerned a matter of judicial administra-

tion in which petitioners were neither proper nor necessary parties. Petitioners' rights had been adjudicated in the original action and appeal; the mandamus proceeding was merely an exercise by the appellate court of its function of supervising the lower court. And, as a practical matter, petitioners' interests in the outcome of the litigation were fully protected by the permission granted them to appear as *amicus curiae*.

3. The argument that the decree as entered is an unconstitutional interference with the practice of medicine (Pet. 20-32) is an attempt to relitigate the issues involved in the original proceeding, as petitioner's reliance on testimony at the trial shows. The Court of Appeals disposed of this contention in its original opinion, 198 F. 2d at p. 281, as follows:

> We do not attempt to set ourselves up as arbiters of what method of treatment the Hoxsey Clinic shall employ. We are not authorized by law to do so. It is our duty to adjudge the merits of the case in the light of the provisions and intent of the Federal Food, Drug and Cosmetic Act, supra, which close the channels of interstate commerce against drugs which are misbranded.

The decree in this case prohibits misbranding, the labeling of the drugs to imply that they are effective in the cure of cancer. Nothing in that prohibition interferes with the practice of medicine.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

AUGUST, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 309777 394

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No. 257

Supreme Court of the United States

OCTOBER TERM, 1954

HOXSEY CANCER CLINIC, a partnership, and
HARRY M. HOXSEY, an individual,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

Petition for certiorari was denied by this Court October 14, 1954, without opinion.

It is respectfully submitted that such denial is in disregard of substantial grounds available to petitioner although not previously presented, as well as intervening circumstances of substantial effect.

It was strenuously urged in the petition that the judgment which was appealed to the Court of Appeals was void for want of jurisdiction of the District Court to enter same, it being an amendment of a judgment entered at a prior term of court.

It was pointed out that under the direct holding of this Court in *Re: National Park Bank*, 256 U.S. 131, 41

Sup. Ct. 403, 65 L. Ed. 863, the District Court was *powerless* to modify its decree after expiration of the term at which it was entered, and thus that it could not be compelled to do so by *mandamus* as was done in this case.

No reply brief was filed by petitioners for the reason that it was not believed the cases cited by the United States in opposition even remotely overcame the rule as above applied by this Court.

Only two cases were cited by the Government, *United States* v. *United States District Court*, 334 U.S. 258; and *In re Washington and Georgetown Railroad Company*, 140 U.S. 91.

In the first of these cases, 334 U.S. 258, it was held:

> "The power of a Circuit Court of Appeals to *alter* its mandate *ceases*, except as to matters of form, *with the end of the term* during which the mandate went down."

citing, *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, 72 L. Ed. 168, 48 Sup. Ct. 97. If the power to alter the mandate ceases, it would seem to follow that power to mandamus would also cease.

In the other cited case, 140 U.S. 91, which is also cited in the first case, there was no question of *term time* involved, but it was held that mandamus was a proper remedy to enforce compliance with the mandate where the lower court had allowed interest *in violation of the mandate*, the amount involved being too small to be the subject of a writ of error.

As stated in the opinion of the Court of Appeals in the mandamus action, 207 F.2d 567 (Appendix to Petition herein, p. ii, note 4), the mandate of that Court directing an injunction was issued February 7, 1953. Judgment thereon was not entered until June 29, 1953. Therefore if the Government felt that the mandate was not being obeyed, it had ample time in which to ask the Court of Appeals, *by mandamus*, to compel its obedience. And during that time the Court of Appeals, *at the same term*, would have had ample power even to alter its own mandate and specify exactly what form of injunction should be entered.

But having waited until after the term of court had expired at which the judgment was entered, it is submitted that neither the District Court nor the Court of Appeals by mandamus had any *power* to alter that decree.

On October 19, 1954, the Supreme Court of Florida handed down a decision, *Baldor et al.* v. *Rogers*, of which we do not yet have any official citation, but a copy of the opinion in which case is set out in full in an Appendix hereto.

While such an opinion is not, of course, *at all* binding upon this Court, it does contain some very *persuasive* statements supporting the fifth point presented in our petition for certiorari to the effect that the decree herein, by eliminating the qualifying phrase, becomes violative of the Fifth and Sixth Amendments.

In the opinion that Court says:

> "It seems to us that the gist of the whole controversy is the propriety of the treatment administered, that is the Koch method vs. surgery and irradiation.

"* * * We believe the pivotal question is whether a physician who uses a method *other than* X-ray, radium and surgery in treating cancer, by that act alone, indulges in malpractice. The appellant concedes that these three methods *'have the blessing of the American Medical Association'* but he contends that there is no sure cure for the ailment and no 'unanimity of opinion as to which of said procedures should be employed on *sic* a particular case.'

"This Court will take judicial notice of the supreme effort being made by the members of the medical profession and by the citizenry as well to conquer the great human killer, cancer. The right is unrelenting, organizations against the foe are active everywhere, and drives for funds to finance the conquest are constant. The reason, of course, for the intensive campaign is that the disease is out of hand *because the remedy is so far unfound.*

* * * * * * * * *

"We do not propose to indicate what from the record in this case would appear to be the proper treatment in a given case. We are not physicians and we have no light on the subject except such as is shed by the testimony of physicians who are not in accord. But we do have the conviction that the heroic effort being made by members of the medical profession and other scientists only emphasizes that an enemy is so far being fought in the dark and that *one man should not be condemned from the fact alone that he chooses a weapon that another may consider a reed."*

That is the very thing which the decree appealed from does. It condemns this medicine in the treatment of cancer no matter to what extent the claims of curative value may be qualified.

The Florida Court said further in its opinion:

> "We cannot *by judicial pronouncement* decide a question that challenges the talent and thought of the medical and allied professions. By approving the verdict and judgment fixing responsibility on the appellant, *we would come perilously close to determining as a matter of law* that some treatment other than the one he used, the Koch method, was the one to become a boon to numberless sufferers. How strange would now appear a judicial decision made a few generations ago that a physician who did not bleed his patient was so callous to accepted treatment that he was a malpractitioner!"

The Court of Appeals in its original opinion in this case, 198 F.2d 273, followed this same line of reasoning when it said:

> "We do not attempt to set ourselves up as *arbiters* of what method of treatment the Hoxsey Clinic shall employ. *We are not authorized by law to do so.*"

But when that court ordered the District Court, after term, to delete the phrase which would have permitted the prescribing of the medicines involved if the label were properly qualified, then it did become such an arbiter as it was not authorized by law to become.

It is interesting to note that Mr. Benedict F. Fitzgerald, Jr., of Washington, D. C., appeared for appellant in the *Baldor* case, *supra*. Mr. Fitzgerald is at present counsel for the National Association for the Advancement of Independent Research, and at one time, as counsel to the late Senator Charles W. Tobey, Chairman of the Inter-

state and Foreign Commerce Committee, was in charge of a Senate investigation into the alleged conspiracy to restrain the *use of drugs* in the treatment of cancer. In one of his progress reports to the Committee, after extensive study, including a study of the Hoxsey Cancer Clinic and the Court cases involving it, including this case, he reported:

> "Is there any dispute among recognized scientists in America and elsewhere in the world on the use of radium and x-ray therapy in the treatment of cancer? The answer is definitely Yes; there is a division of opinion on the use of radium and x-ray. Both agencies are destructive, not constructive. In the alleged destruction of the abnormal, outlaw or cancer cells both x-ray therapy and radium destroy normal tissue and normal cells. Recognized medical authorities in America and elsewhere state positively that x-ray therapy *can cause cancer* in and of itself. Documented cases are available.
>
> "The increased number of cancer patients in America of all ages and the apparent failure to presently cope with this dread disease indicates the necessity of a sustained effort of private and Federal agencies to continue research in the field of cancer; its causes and treatment.
>
> "If radium, x-ray or surgery or either of them is the complete answer, *then the greatest hoax of the age is being perpetrated upon the people* by the continued appeal for funds for further research. If neither x-ray, radium or surgery is the complete answer to this dreaded disease, and I submit that it is not, then what is the plain duty of society? Should we stand still? Should we sit idly by and count the number of physicians, surgeons and cancerologists who are not only divided but who, because of fear or favor, are

forced to line up with the *so-called accepted view* of the American Medical Association, or should this Committee make a full scale investigation of the organized effort to hinder, suppress and restrict the *free flow of drugs which allegedly have proven successful* in cases where clinical records, case history, pathological reports and x-ray photographic proof, together with the alleged cured patients, are available?

"* * * My investigation to date should convince this Committee that *a conspiracy does exist* to stop the free flow and use of drugs in interstate commerce which allegedly has solid therapeutic value."

Recently a committee of 10 *medical* doctors visited the Hoxsey Cancer Clinic for two days, and reported:

"We find as a fact that our investigation has demonstrated to our satisfaction that the Hoxsey Cancer Clinic, at Dallas, Texas, is successfully treating pathologically proven cases of cancer, both internal and external, without the use of surgery, radium or x-ray."

Is this Court willing to put its stamp of approval upon a *judicial* determination by the Court of Appeals for the Fifth Circuit that one method is and another is not of therapeutic value in treatment of cancer, when the *medical* authorities themselves are thus still searching "in the dark" for a cure?

Would it not be more in keeping with upholding the fundamental rights of the American people, for this Court to conclude, as did the Florida Supreme Court, that:

"If there is no certain cure and if the physician did not indulge in quackery by representing he had one, both of which were well established by testimony, * * *."

then the avenues of interstate commerce should remain open to medicines prescribed by the physicians at the Hoxsey Clinic so long as their claims of curative value are properly qualified by statements revealing the conflicting opinion as to their truth?

It is respectfully submitted that these, as well as other substantial questions presented in the petition for certiorari, should be decided by this Court, and to that end that a rehearing should be allowed, upon which the petition should be granted.

Respectfully submitted,

JAMES H. MARTIN,
Dallas National Bank Building,
Dallas, Texas,
Attorney for Petitioners.

Of Counsel:

LEE WILLIAMS,
1015 Cravens Building,
Oklahoma City, Oklahoma.

November, 1954.

CERTIFICATE

The undersigned attorney for petitioners hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and that the same is restricted to substantial grounds available to petitioner and not previously presented, together with a case decided since the denial of the petition and having persuasive effect.

JAMES H. MARTIN,

Attorney for Petitioners.

APPENDIX

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A.D. 1954

EN BANC.

DR. JULIAN F. BALDOR, and FIRST PALMA CEIA HOSPITAL, INC., a corporation,
Appellant,

-vs-

J. T. ROGERS,
Appellee.

Opinion filed October 19, 1954

An Appeal from the Circuit Court for Hillsborough County, I. C. Spoto, Judge

Benedict F. Fitzgerald, Jr., (Washington, D.C.), for Appellant

McEwen & Cason and James M. McEwen, for Appellee

THOMAS, Acting Chief Justice:

The appellee was awarded a verdict of $65,000 in his action against the appellant, a physician, for malpractice in treatment of a malignancy.

It was charged in the complaint that the appellee engaged the appellant to treat a growth on his lip which had been present about two months and had been diagnosed as cancer. The appellant prescribed injections for the malady. In nine months the cancer had so spread that it involved the appellee's lip and chin but the appellant had not meanwhile recommended or used X-ray, radium or surgery to alleviate the condition. The appellant then discharged the appellee. It was alleged that the appellant should have

known that the lesion could not be properly treated with "shots" and should have changed the treatment when it was obvious that the condition worsened, and further that the appellant should not have "abandoned" the appellee without arranging for further treatment. It was averred that in the "vicinity" radium, X-ray and surgery were the approved methods of treating such malignancy. Lack of ordinary skill and diligence on the part of the physician were charged virtually to have ruined the patient.

The appellee, to resort to his own analysis of his complaint as given in his brief, sought "damages in three phases": (1) for not applying "the means * * * ordinarily and generally used by other physicians and surgeons of ordinary skill and learning * * * in Hillsborough County, Florida, and similar communities" in treating appellee's disease with glyoxylide; (2) for failure to change to radium, X-ray, or surgery when he realized the treatment was ineffective; and (3) for abandonment of his patient "by sending him home * * * without arranging for any other medical attention."

Numerous defenses were filed, *i.e.*, denying malpractice, asserting the propriety of the treatment, charging contributory negligence by failing to follow directions, claiming correct treatment of the disease was not restricted to the three classical methods but that glyoxylide, Krebiozen, nitrogen mustard and other "chemical or biological treatments" could be used with success, stating that the appellee had reported that both surgery and X-ray had already been used to no avail in treating another growth on appellee's face, denying that the appellant had abandoned the appellee, but asserting, on the contrary, that he could do no more for him unless the appellee would undergo an operation in which case other physicians should perform it, and that to this the appellee agreed.

It seems to us that the gist of the whole controversy is the propriety of the treatment administered, that is the Koch method vs. surgery and irradiation.

Apparently there was no doubt about diagnosis, both physician and patient knowing when they first conferred that the growth was malignant. It is plain to us, too, that no importance can be given the suggestion that failure to advise the patient, when his condition did not improve, that he should resort to surgery or irradiation amounted to malpractice. It is clear from the appellee's own testimony that he declined surgical treatment when it was suggested by a physician whom he consulted before seeing the appellant. His attitude may best be learned by quoting his statements. When asked why he had a "shot" administered by the appellant after surgery had been recommended by the other physician he replied: "I did not want to be cut on." When asked why he did not "want to be cut on", he said "For I heard so many people say it would scatter."

Nor can we fight logic in the argument that abandonment of appellee by appellant would shorten the latter's life. If the premise of improper treatment is sound then the so-called abandonment would have been to the appellee's advantage had it occurred earlier.

To repeat, we believe the pivotal question is whether a physician who uses a method other than X-ray, radium and surgery in treating cancer, by that act alone, indulges in malpractice. The appellant concedes that these three methods "have the blessing of the American Medical Association" but he contends that there is no sure cure for the ailment and no "unanimity of opinion as to which of said procedures should be employed on *sic* a particular case."

This Court will take judicial notice of the supreme effort being made by the members of the medical profes-

sion and by the citizenry as well to conquer the great human killer, cancer. The fight is unrelenting, organizations against the foe are active everywhere, and drives for funds to finance the conquest are constant. The reason, of course, for the intensive campaign is that the disease is out of hand because the remedy is so far unfound.

The record in this case abounds in references by physicians to such terms as chemotherapy, harmones, synthetic chemical compounds, nitrogen mustard, folic acid, aminopterin, urethane; Krebiozen, oxidation enzymes, escharotics, bacteriophage, benzoquinoline, antigen. One of the plaintiff's own witnesses said that "17% to 18% of the money of the American Cancer Society allocated to research is spent in the field of chemotherapy.

We do not propose to indicate what from the record in this case would appear to be the proper treatment in a given case. We are not physicians and we have no light on the subject except such as is shed by the testimony of physicians who are not in accord. But we do have the conviction that the heroic effort being made by members of the medical profession and other scientists only emphasizes that an enemy is so far being fought in the dark and that one man should not be condemned from the fact alone that he chooses a weapon that another may consider a reed.

From this record and the background on which it is superimposed, we find no reason to invoke the rule that the matter was one for the jury which the jury by its verdict settled. There could have been no clear-cut issue whether the appellant committed malpractice when he used a certain method, for no cure has been discovered. Upon the absence of cure there is agreement so it cannot be logically declared that the jury could determine the responsibility of the appellant because of a treatment that might be, from the witnesses they chose to believe, more acceptable. If there is no certain cure and if the physician

did not indulge in quackery by representing he had one, both of which were well established by testimony, then the issues raised by the pleadings in this case and the facts built around them did not justify the jury in concluding that for the appellee's misfortune the appellant should pay.

As was said by the Supreme Court of Washington in *Dahl* v. *Wagner*, 87 Wash. 492, 151 P. 1079, "The courts cannot hold a defendant in a malpractice suit to the theory of the one opinion of physicians on a set of facts to the exclusion of the other contrary opinion by other physicians." If the treatment used is approved by a " 'respectable minority of the medical profession' " that would relieve the defendant of the charge of malpractice. The doctor is obligated only to use reasonable skill and he fulfills his obligation if he uses methods approved by others of the profession who are reasonably skilled. Of like effect were the holdings in *Staloch* v. *Holm et al.*, 100 Minn. 276, 111 N.W. 264, *Gresham* v. *Ford*, 192 Tenn. 310, 241 S.W. 2d 408, and *Frtiz* v. *Horsfall*, 24 Wash. 2d 14, 163 P. 2d 148.

No doubt is cast on the respectability of the physicians who testified that they used the treatment employed by the appellant. Some of them were emphatic in their condemnation of the 'classical' methods which the appellant is now charged with failure to use.

We cannot by judicial pronouncement decide a question that challenges the talent and thought of the medical and allied professions. By approving the verdict and judgment fixing responsibility on the appellant, we could come perilously close to determining as a matter of law that some treatment other than the one he used, the Koch method, was the one to become a boon to numberless sufferers. How strange would now appear a judicial decision made a few generations ago that a physician who did not bleed his patient was so callous to accepted treatment that he was a malpractitioner!

[APPENDIX]

The testimony of numbers of physicians who took the witness stand is in hopeless conflict about the wisdom of using the method employed by the appellant and about the efficacy of radium, X-ray and surgery. At least one of them expressed the opinion that X-ray was more detrimental than beneficial.

The record is largely devoted to an erudite discussion on the merits and demerits of various treatments by physicians eminently qualified to participate. Though it is most interesting and enlightening, it is not too convincing because of the divergence of views. On one thing they agree: there is not yet a certain cure.

To our minds the testimony lacks much as a basis for a verdict that the appellant should compensate the appellee.

The appellant has presented many questions but a decision of the first in his favor makes decisions of the others unnecessary.

The verdict requested by the appellant should have been directed so the judgment in favor of appellee is

Reversed.

SEBRING, HOBSON and MATHEWS, J.J., and HERIN, Associate Justice, CONCUR

TERRELL and DREW, J.J., DISSENT

DREW, J., Dissenting:

The complaint in this cause sought damages upon the three separate theories set forth in page two of the Opinion by Justice Thomas, *viz.*

1. That the treatment given was not proper;
2. That the treatment given should have been discontinued and another adopted after it showed no favorable results; and

3. That the defendant abandoned the plaintiff.

It is not disputed that a physician may become liable in damages under any one of the three theories upon which the complaint is based.

The opinion by Justice Thomas effectively disposes of the first of the foregoing theories of liability and I am wholly in accord with that opinion as it is limited to the disposition of the first proposition. I am entirely in accord with the views there expressed that the record in this case justified the conclusion that, as a matter of law, the administration of the Koch treatment to the plaintiff in this cause did not by that act alone constitute malpractice. If the complaint had been based upon the premise alone that the treatment given was improper, I would concur in the opinion and judgment by my able brother Justice Thomas, but the opinion and judgment, as prepared, leave undetermined and undecided two major phases of the litigation. I think there was competent and substantial evidence in the record to sustain the judgment rendered if the jury chose to believe, as it undoubtedly did, that the treatment given should have been discontinued after it became apparent that the condition being treated was becoming aggravated and that the failure to discontinue such treatment resulted in damage to the plaintiff.

There is also competent, substantial evidence in the record, which the jury could have and apparently did believe, that the defendant abandoned the plaintiff. I, therefore, respectfully dissent and would affirm the judgment.

TERRELL, J., Concurs.